88- 1765

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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NO.

ISMAEL PIZARRO, a/k/a
LISA PIZARRO,

Petitioner

versus

WILLIAM PLATT, TIMOTHY CARVER
and COUNTY OF LEHIGH,

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Richard J. Orloski,
Attorney for Petitioner
ORLOSKI & HINGA
1005 S. Cedar Crest Blvd.
Allentown, PA 18103
(215) 433-2363

63 pp

QUESTION PRESENTED FOR REVIEW

I. WHETHER OR NOT DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT ON PLAINTIFF'S CONSTITUTIONAL CLAIMS ARISING FROM HER RAPE MAY BE GRANTED AUTOMATICALLY FOR ALLEGED "LACK OF RESPONSE" WHERE: 1) PLAINTIFF DID TIMELY RESPOND TO THE SUMMARY JUDGMENT MOTIONS; AND 2) EVEN ASSUMING ARGUENDO THAT PLAINTIFF DID NOT RESPOND ON TIME, RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE, THE INTEREST OF JUSTICE AND THE DUE PROCESS REQUIRE THAT PLAINTIFF'S CONSTITUTIONAL CLAIMS BE REINSTATED AND ADDRESSED ON THEIR MERITS?

TABLE OF CONTENTS

	PAGE
Question Presented For Review.....	i
Table of Citations.....	ii
Opinion Below.....	2
Jurisdiction.....	3
Federal Provisions Involved.....	3
Statement of the Case.....	4
Reason Relied on For Allowance Of the Writ.....	5
Argument.....	5
Conclusion.....	41
Appendix.....	
Order of U.S. Court of Appeals For Third Circuit, dated 2/28/89.....	42
Order of U.S. Court of Appeals For Third Circuit, per Scirica, J., entered 4/7/89.....	44
Order of U.S. District Court for Eastern District of PA, per Huyett, J., entered 8/31/88.....	47
Order of U.S. District Court for Eastern District of PA, per Huyett, J., entered 7/28/88.....	55

TABLE OF CITATIONS

PAGE

Associated Press v. U.S., 326 U.S 802 reh. den. 326 U.S. 803 (1945)..... 31

Dowling v. City of Phila., 855 F.2d 136 (3d Cir, 1988)..... 27

Gans v. Mundy, 762 F.2d 338 (3d Cir, cert denied ___U.S. ___ (1985)..... 31

Greene v. Union Mutual Life Ins. Co. of America, 764 F.2d 19 (st Cir, 1985)..... 39

Kinee v. Abraham Lincoln Federal Savings & Loan Asso., 365 F.Supp. 975 (E.D., Pa 1973)... 32

Macklin v. Butler, 553 F.2d 525 7th Cir, 1977)..... 36

Smith v. Hudson, 600 F.2d 60, 64-65 (6th Cir, cert denied 444 U.S. 986 (1979)..... 30

Theilmann v. Rutland Hospital, Inc. 445 F.2d 853, 855 (2d Cir, 1972) (per curiam).. 31

U.S. v. Bosuig, 530 F.2d 1105 (2d Cir, 1976)..... 31

XRT, Inc. v. Krellenstein,
448 F.2d 772 (5th Cir,
1971)..... 33

IN THE
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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Ismael Pizarro, a/k/a Lisa Pizarro, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals For the Third Circuit.

OPINIONS BELOW

The Order of the United States Court of Appeals For the Third Circuit entered 2/28/89 is unrecorded and appears at page 42 of the Appendix herein.

The Order of the United States Court of Appeals For the Third Circuit entered 2/7/89 is unrecorded and appears at page 44 of the Appendix herein.

The Order of the U.S. District Court for the Eastern District of Penna. is unrecorded and appears at page 47 of the Appendix herein.

The Order of the U.S. District Court for the Eastern District of Penna. entered 7/28/88 is unrecorded and appears at page 55 of the Appendix herein.

The Final Order of the Court of Appeals For the Third Circuit was entered 2/28/89 and this Petition For Writ of Certiorari is timely filed within ninety

(90) days thereof. The jurisdiction of this Court rests upon 28 U.S.C. Section 1254(1) and Rule 17 of the Honorable Court.

FEDERAL PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution. and Rule 56 of the Federal Rules of Civil Procedure at Appendix, page herein.

STATEMENT OF THE CASE

On March 5, 1987, Plaintiff filed a Complaint against Defendant's citing damages for constitutional violations arising out of Plaintiff's rape by a prison guard.

Throughout the course of this litigation, Plaintiff experienced difficulty obtaining documents from the Defendants, Platt (a district attorney), Carver (a prison warden), and County of Lehigh (the operator of the prison):

> A) Deposition of William Platt of September 17, 1987 canceled for failure of Platt to bring documents to deposition.
>
> B) Order of March 30, 1988 directing the Defendants, Platt, Carver and County of Lehigh to produce the documents within seven (7) days. (8a)
>
> C) The failure of the Defendant, Platt to comply with the

Order of March 30, 1988, in the specific instance: the Defendant, Platt, never produced any documents relative to the handling of prison complaints of abuse by guards but instead produced an Affidavit which was mailed to Plaintiff's counsel on June 30, 1988. Nowhere in the Order of June 9, 1988 did the Court give Platt to leave to produce an affidavit in lieu of documents which were obviously consulted to produce the affidavit. (53a -56a)

D) The failure of the Defendants, Carver and County of Lehigh, to comply with the Order of March 30, 1988, in the specific instance: on June 30, 1988, the Defendant, Carver, arrived at the deposition without any documents whatsoever, but given the Court Order of June 9, 1988, requiring Plaintiff to proceed with the deposition of Carver within 30 days of June 9, 1988, Plaintiff's counsel proceeded to orally examine Defendant, Carver, and to produce the documents required at the deposition at a subsequent time. (15a)

In an effort to cut through this problem, the trial court entered an Order on June 9, 1988 which provided as follows:

"Upon consideration of the summary

judgment motions filed by defendants, the plaintiff's re-sponse, and the parties' supporting memoranda, IT IS ORDERED that

1. Plaintiff shall, within five (5) days of the date of this order, notify the court by letter of specifically what documents he is still seeking from defendant Platt. Plaintiff shall also explain how these documents and the deposition questions he plans to ask defendant Carver are relevant to the defendants' summary judgment motions.

2. Plaintiff shall take the deposition of defendant Carver within thirty (30) days of the date of this order. Plaintiff shall notify the court by letter of the date of the Carver deposition.

3. Plaintiff shall file substantive responses to the defendants' motions for summary judgment within twenty (20) days of the date of the Carver deposition.

4. Defendants may file replies to these responses within twenty (20) days of service.

NO FURTHER EXTENSIONS SHALL BE GRANTED. Plaintiff and his counsel shall comply with the above deadlines or face possible sanctions, including dismissal.

Telephone notice of this order shall be given forthwith.

IT IS ORDERED."

In literal compliance with the Order of June 9, 1988, Plaintiff's counsel imme-

diately did two things: 1) Plaintiff's counsel wrote letter of June 14, 1988 (hand delivered) as required by the court explaining that he needed two things A) the deposition of Carver; and B) the documents which were previously ordered to be produced. The letter of June 14, 1988 noted as follows:

> Dear Judge Huyett,
>
> In response to your order of June 9, 1988, the following has been compiled:
>
> Plaintiff's theory of the case is that Defendants' Platt and Carver, consistent with a long-standing policy of covering up official misconduct of law enforcement officials conspired together to cover-up the criminality of the Defendant, Plata, in violation of Plaintiff's constitutional right to bodily security, equal protection of the laws, due process of law, and the constitutional right to be free of cruel and unusual punishment, and thereby encouraged, aided and abetted the misconduct of Defendant, Plata. In

order to prove the claim, Plaintiff requested the documents from the Defendants. Some have been produced; others are outstanding. Specifically, the Plaintiff has requested that Defendants, Platt and Carver, produce all documents, memoranda, correspondence or other writings by inmates incarcerated in Lehigh County Prison about abuse by prison guards.

This information is critical to Plaintiff';s case because if produced, it will show that there was a longstanding policy by Defendants, Platt and Carver, of covering up official misconduct by law enforcement officials and prison guards. Defendant Plata was aware of this policy and rightfully believed that no criminal sanctions would be used against him for raping a black inmate and he was thereby implicitly encouraged by Defendants, Platt and Carver to engage in such illegal behavior in violation of Plaintiff's constitutional rights.

In addition, Plaintiff intends to question Carver about the incident of Plata/Pizarro, the official investigation about prison guard abuse of inmates prior to the Plata/Pizarro incident, and all incidents about prison guard abuse of inmates, and the handling of prison guard abuse cases by the County of Lehigh.

Upon receipt of these documents and the deposition of Carver will enable

Plaintiff to answer the Motion For Summary Judgment on the merits.

Very truly yours,

Richard J.Orloski"

Upon receipt of this letter, the trial court entered an Order on June 23, 1988 indicating that the "...Defendants shall respond to the above letter by July 1, 1988..." The Defendant, Platt, never responded to the court by July 1,1988, and instead merely sent Plaintiff's counsel an "Affidavit" indicating that there were documents, and he was summarizing them for Plaintiff's counsel.

The Defendants, Carver and County of Lehigh, never responded to the court by July 1, 1988, and instead wrote a letter of July 13, 1988 advising the court that it still did not produce the documents, but that the documents would be forthcoming.

That was the procedural context within which the issue became focused:

June 9, 1988: the court wanted to know what discovery items Plaintiff wanted;

June 14, 1988: Plaintiff's counsel advises the court that he needs the Carver deposition, plus documents;

June 23, 1988: the trial court orders the Defendants to respond by July 1, 1988 to Plaintiff's letter of June 14, 1988 requesting documents.

June 30, 1988: Defendant, Platt, responds not by producing documents, but offering a summary of documents which he examined.

July 13, 1988: Defendants, Carver and County of Lehigh, responded 13 days late by saying that the documents were not produced at the deposition, but that

they would be forthcoming.

July 14, 1988: Defendants, Carver and County of Lehigh, finally mail documents to Plaintiff's counsel.

The procedure used on June 30, 1988--get the oral testimony NOW, and give the Defendant, Carver, still another opportunity to produce the documents--was in the spirit of the Local Rule 24(f) of United States District Court for the Eastern District of Pennsylvania to try to resolve discovery disputes without the necessity of court intervention.

On July 13, 1988, Thomas Caffrey, Esquire, wrote the letter explaining that the oral portion of deposition of June 29, 1988, (sic) was done, but that the deposition was not completed because the documents still had to be produced.

The concluding paragraph of the letter of July 13, 1988 was as follows:

> "I hope that this letter satisfies the directive issued by you in your June 23, 1988 order."

According to letter from Caffrey to the trial court, the deposition was conducted on June 29, 1988. That is factually inaccurate. The deposition was held on June 30, 1988.

As Plaintiff's counsel read the letter, Thomas M. Caffrey, Esquire, was apologizing to the Court for not literally complying with the Order of June 9, 1988 requiring the completion of the Carver deposition within 30 days of June 19, 1988.

On July 14, 1988, Defendants, Carver and County of Lehigh, finally "completed" the Carver deposition by sending an "incomplete" set of documents to Plaintiff's counsel.

In the letter of July 14, 1988, the Defendants, Carver and County of Lehigh, are explaining that some documents are still not being produced:

> "Please note that Tim Carver was unable to locate written correspondence from Mr. Pizarro containing allegation of physical mistreatment by correctional officers."

As Plaintiff's counsel read the letter of July 13, 1988, and July 14, 1988, the Defendants, Carver and County of Lehigh, were explaining to the court that they were not complying with the Order of June 9, 1988, because the document portion of the Carver deposition was not completed on June 30, 1988, and that they would shortly be produced.

As Plaintiff's counsel understood the Order of June 9, 1988 requiring a brief in opposition to the Defendants' Motion For Summary Judgment within twenty (20) days of the completion of the Carver deposition, the deposition of Carver was not completed until he produced the documents which he was supposed to produce by the Order of March 30, 1988.

As Plaintiff's counsel understood the Order of June 9, 1988, Plaintiff had ap-

proximately 20 days plus 3 days for mailing from July 14, 1988 to file his brief inasmuch as the deposition was completed on July 14, 1988 by the production of the documents. In other words, Plaintiff's brief in opposition to summary judgment was not due until August 6, 1988.

In actual fact, Plaintiff's Brief in Opposition to Motion For Summary Judgment was filed on August 3, 1988 or exactly within 20 days of the mailing of the Carver documents to complete the deposition.

The delay in this proceeding has not been caused by the Plaintiff, but by the controversy over production of documents by the Defendants.

From the perspective of Plaintiff's counsel, Plaintiff literally complied with the Order of June 9, 1988, and the delay was caused by the failure of the Defendant,

Carver, to produce the documents at the deposition of June 30, 1988, and the continuing failure of the Defendant, Platt, to produce any documents concerning the handling of prisoner complaints about guard abuse and substituting an Affidavit by Defendant, Platt, concerning his examination of the records available to him.

On July 28, 1988, the district court entered an order granting Defendants Motion for Summary Judgment based upon Plaintiffs alleged failure to respond and upon the incorrect factual premise that "...the parties completed defendant Carver's deposition on June 29, 1988." On August 31, 1988, the district court denied Plaintiff's timely motion to reconsider the order granting summary judgment.

After granting summary judgment in favor of the Defendants, Platt, Carver and

County of Lehigh, the trial court then scheduled a hearing on damages against sole remaining Defendant, Plata, against whom the default judgment was entered. After hearing, the trial court, on September 16, 1988 entered judgment in favor of Plaintiff, and against the Defendant, Plata, in the amount of Thirty Five Thousand ($35,000.00) Dollars. This judgment was entered on September 21, 1988. On September 28, 1988, the Plaintiff filed an appeal to the Court of Appeal for the Third Circuit.

Without oral argument the Court of Appeals entered a Judgment Order upholding the automatic summary judgment denied Plaintiff's Petition for Rehearing. Plaintiff's Petition for Writ of Certiorari is now before this Honorable Court for disposition.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

Review by certiorari is appropriate in the case at bar under Rule 17(1)(a) of the Rules of the United States Supreme Court in that a Federal Court of Appeals has rendered a deicision in conflict with the decision of another federal court of appeals on the same matter as to call for an exercise of this Court's power of supervision.

ARGUMENT

I. WHETHER OR NOT DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT ON PLAINTIFF'S CONSTITUTIONAL CLAIMS ARISING FROM HER RAPE MAY BE GRANTED AUTOMATICALLY FOR ALLEGED "LACK OF RESPONSE" WHERE 1) PLAINTIFF DID TIMELY RESPOND TO THE SUMMARY JUDGMENT MOTIONS AND 2) EVEN ASSUMING ARGUENDO THAT PLAINTIFF DID NOT RESPOND ON TIME, RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE, AND THE INTEREST OF JUSTICE AND THE DUE PROCESS REQUIRE THAT PLAINTIFF'S CONSTITUTIONAL CLAIMS BE REINSTATED AND ADDRESSED ON THEIR MERITS?

1. Plaintiff responded to Defendants'

Motions for Summary Judgment in a timely manner. Throughout the course of this litigation, Plaintiff experienced difficulty obtaining documents from the Defendants:

A) Deposition of William Platt of September 17, 1987 cancelled for failure of Platt to bring the documents to deposition.

B) Order of March 30, 1988 directing the Defendants, Platt, Carver and County of Lehigh to produce the documents within seven (7) days.

C) The failure of Defendant, Platt, to comply with the Order of March 30, 1988, in the specific instance: the Defendant, Platt, never produced any documents relative to the handling of prison complaints of abuse by guards but instead produced an Affidavit which was mailed to Plaintiff's counsel on June 30, 1988. Nowhere in the Order of June 9, 1988 did the Court give Platt leave to produce an affidavit in lieu of documents which were obviously consulted to produce the affidavit.

D) The failure of the Defendants, Carver and County of Lehigh to comply with the Order of March 30, 1988, in the specific instance: on

Motions for Summary Judgment in a timely manner. Throughout the course of this litigation, Plaintiff experienced difficulty obtaining documents from the Defendants:

A) Deposition of William Platt of September 17, 1987 cancelled for failure of Platt to bring the documents to deposition.

B) Order of March 30, 1988 directing the Defendants, Platt, Carver and County of Lehigh to produce the documents within seven (7) days.

C) The failure of Defendant, Platt, to comply with the Order of March 30, 1988, in the specific instance: the Defendant, Platt, never produced any documents relative to the handling of prison complaints of abuse by guards but instead produced an Affidavit which was mailed to Plaintiff's counsel on June 30, 1988. Nowhere in the Order of June 9, 1988 did the Court give Platt leave to produce an affidavit in lieu of documents which were obviously consulted to produce the affidavit.

D) The failure of the Defendants, Carver and County of Lehigh to comply with the Order of March 30, 1988, in the specific instance: on

> June 29, 1988, the Defendant, Carver, arrived at the deposition without any documents whatsoever but given the Court Order of June 9, 1988, requiring Plaintiff to proceed with the deposition of Carver within 30 days of June 9, 1988, Plaintiff's counsel proceeded to orally examine Defendant, Carver, and to produce the documents required at the deposition at a subsequent time.

The procedure used on June 29, 1988--get the oral testimony NOW, and give Defendant Carver, still another opportunity to produce the documents--was in the spirit of the Local Rule 24(f) of the United States District Court for the Eastern District of Pennsylvania to try to resolve discovery disputes without the necessity of court intervention.

On July 13, 1988, Thomas Caffrey, esquire, wrote the letter concerning the oral deposition of June 29, 1988, but that the deposition was not completed

because the documents still had to be produced.

The concluding paragraph of the letter of July 13, 1988 was as follows:

> "I hope that this letter satisfies the directive issued by you in your June 23, 1988 order."

As Plaintiff's counsel read the letter, Thomas M. Caffrey, Esquire, was apologizing to the Court for not literally complying with the Order of June 9, 1988 requiring the completion of the Carver deposition within 30 days of June 30, 1988.

On July 14, 1988, Defendants, Carver and County of Lehigh, finally "completed" the Carver deposition by sending an "incomplete" set of documents to Plaintiff's counsel.

In the letter of July 14, 1988, Defendants, Carver and County of Lehigh, are

explaining that some documents are still not being produced:

> "Please note that Tim Carver was unable to locate written correspondence from Mr. Pizzaro containing allegation of physical mistreatment by correctional officers."

As Plaintiff's counsel read the letters of July 13, 1988, and July 14, 1988, the Defendants, Carver and County of Lehigh, were explaining to the Court that they were not complying with the Order of June 9, 1988 because the Carver deposition was not completed on June 29, 1988, and that they would shortly be produced.

As Plaintiff's counsel understood the Order of June 9, 1988 requiring a brief in opposition to Defendants' Motion for Summary Judgment within twenty (20) days of the completion of the Carver deposition, the deposition of Carver was not completed

until he produced the documents which he was supposed to produce by the Order of March 30, 1988.

In actual fact, Plaintiff's Brief In Opposition to Motion For Summary Judgment was filed on August 3, 1988 or exactly within 20 days of the mailing of the Carver documents to complete the deposition.

The delay in this proceeding has not been caused by Plaintiff, but by the controversy over production of documents by the Defendants.

From the perspective of Plaintiff's counsel, Plaintiff literally complied with the Order of June 9, 1988, and the delay was caused by the failure of Defendant, Carver, to produce the documents at the deposition of June 29, 1988, and the continuing failure of Defendant, Platt to produce any documents concerning the han-

dling of prisoner complaints about guard abuse and substituting an Affidavit by Defendant, Platt, concerning his examination of the records available to him.

On July 28, 1988, the district court entered an Order granting Defendant's Motion For Summary Judgment based upon Plaintiff's alleged failure to respond and upon the incorrect factual premise that "...the parties completed Defendant, Carver's deposition on June 29, 1988.

Thus, the Orders granting and upholding automatic summary judgment ought to be reversed. Plaintiff did file a timely response, and the claim against Defendants should be reinstated.

2. The Order of June 9, 1988, counsel's letter of June 14, 1988 and the Order of June 23, 1988 requiring Defendants to respond by July 1, 1988 created the impres-

sion in Plaintiff's counsel that the trial court was requiring Defendants to produce the documents before Plaintiff's counsel responded to the summary judgment. The sequence began with the Order of June 9, 1988:

> June 9, 1988: the court wanted to know what discovery items Plaintiff wanted;
>
> June 14, 1988: Plaintiff's counsel advises the court that he needs the Carver deposition, plus documents.
>
> June 23, 1988: the trial court orders the Defendants to respond--by July 1, 1988--to Plaintiff's letter of June 14, 1988 requesting documents.

The Defendant, Platt, never responded to the Order of June 23, 1988 by producing a single document. Instead, Defendant, Platt, took an affidavit indicating that there were substantial documents, and then

he went on to summarize them.

The Defendants, Carver and County of Lehigh, never responded to the Court by July 1, 1988. Instead, Carver attended the scheduled deposition on June 30, 1988, and failed to bring a single document with him. At the deposition, counsel for Defendants, Carver and County of Lehigh, finally agreed to produce the documents. Hence, on July 13, 1988--13 days after the court imposed deadline--Caffrey wrote to the court, and explained that the documents would be forthcoming. At that point, Plaintiff's counsel believed that he had won the document war. Although Defendant, Platt did not produce the documents, his affidavit indicating that he <u>never</u> prosecuted prison guards accused of assaulting prisoners seemed to prove Plaintiff's claim. Additionally, the Defendant, Carver and County

of Lehigh, were finally going to produce the documents.

As explained in the letter of June 14, 1988, Plaintiff needed the Carver deposition--and the documents. Plaintiff thus complied with the letter and spirit of the requirements regarding a non-movants duty of responding to a summary judgment motion when discovery is incomplete. Dowling v. City of Philadelphia, 855 F.2d 136 (3d. Cir. 1988. Plaintiff's counsel did not cause the delay. Counsel for Defendants, Carver and County of Lehigh, did. Hence, Plaintiff's counsel assumed that he had 20 days plus three (3) days for mailing from the date that Carver and the County of Lehigh finally produced the documents, namely, 20 plus 3 from July 14, 1988. Nothing in Caffrey's letter of July 13 indicated otherwise.

Unfortunately, the trial court read the letter of July 13, 1988 as starting the 20 days from June 29, 1988--even though the documents were admittedly not produced. Hence, because the Defendants successfully delayed producing documents--and violated the Order of June 23, 1988--they were rewarded by having summary judgment entered in their favor. That result is inconsistent with the Due Process requirements of the Fifth Amendment. Hence, Petitioner respectfully seeks a Writ of Certiorari to review the automatic grant of summary judgment.

3. Even assuming arguendo, that Plaintiff failed to respond in a timely manner, failure to file a timely written response to Rule 56 motion should not result in automatic grant of the motions. John v. State of LA, 757 F.2d 698 (8th

Cir, 1985).

a. Where, as here, no local rule provided sanctions for failure to file a response, the district court's order automatically granting summary judgment for lack of a response must be reversed as it is inconsistent with the requirements of Rule 56 of the Federal Rules of Civil Procedure, John, supra. Rule 56 of Federal Rules of Civil Procedure places the initial burden upon the moving party to prove the lack of a genuine issues of material fact. If and only if Defendants had met that burden can the court grant their motions.

Imposition of ultimate sanction of automatically granting the motion upon alleged failure to file timely response fails to consider whether or not the moving party met its burden under Rule 56. Thus,

even if Plaintiff had failed timely to respond, the automatic granting of summary judgment cannot be upheld where no inquiry was made into the underlying facts regarding Defendants' claim for summary judgment.

Even assuming, arguendo, Plaintiff failed to respond as contemplated by the Court's order, the Court still must search the entire record to determine whether there are genuine issues of material facts requiring trial. Smith v. Hudson 600 F.2d 60, 64-65 (6th Cir), cert denied, 444 U.S. 986 (1979); Federal Rule of Civil Procedure 56(c) provided that summary judgment shall be rendered only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that "the moving party satisfied the standard. Hence, Defendants are not entitled to automatic

summary judgment in this case.

b. Further, the Courts of appeals have cautioned that summary judgment must be used with extreme caution for it operates to deny a litigant his day in court. Summary judgment is an extreme or drastic remedy which should be cautiously applied. U.S. v. Bosuig, 530 F.2d 1105 (2d Cir, 1976); Gans v. Mundy, 762 F.2d 338 (3d Cir), cert denied, ____U.S. ____ (1985).

Summary judgment should not be used as a substitute for the trial of disputed issues of fact. Associated Press v. U.S., 326 U.S. 802 and reh. den. 326 U.S. 803 (1945).

Dismissal is a harsh remedy to be utilized in extreme situations. Theilmann v. Rutland Hospital, Inc. 445 F.2d 853, 855 (2d Cir, 1972) (per curiam).

The purpose and functions of summary judgment are not served in this case. Throwing Plaintiff's constitutional claim out of court based upon Plaintiff's counsel's reasonable interpretation of the circumstances and requirements fails to serve the purposes and functions of summary judgment. Summary judgment for a "lack of response" here unfairly penalizes Plaintiff for the dilatory actions of Defendants as set forth herein.

Hence, the drastic and extreme measure of summary judgment should not be applied here.

c. Summary judgment is inappropriate where the facts are exclusively within the knowledge of the moving party. Kinee v. Abraham Lincoln Federal Savings and Loan Association, 365 F. Supp. 975 (ED, Pa, 1973).

Summary judgment should not be granted where the opposing party has been denied access to paper necessary to establish the existence of a genuine issue for trial. XRT, Inc. v. Krellenstein, 448 F.2d 772 (5th Cir, 1971).

This Plaintiff sought complaints by Plaintiff and prison guards (Carver Dep. NT 39), written directions by Defendant, Carver, concerning treatment of Plaintiff while in holding cells (Carver Dep. NT 40-41), and inmates complaints about abuse against prison guards (Carver Dep. 68-75). Further, Plaintiff awaited production of Defendant Plata's personnel file (Carver Dep. NT 76).

In fact, much of the Carver deposition on June 29, 1988 was spent determining what documents Defendant had in its possession and which ones Defendant was finally will-

ing to produce. (e.g. Carver Dep. NT 38-41, 68-76).

Summary Judgment is particularly inappropriate here where several issues regarding state of mind and issues of credibility, evidence are exclusively within Defendant's control.

Plaintiff's claims against Defendants are for deprivations of constitutional rights arising out of the rape of Plaintiff while held in Defendant's prison. Plaintiff's burden of proof includes evidence of Defendant, County's, policy or custom which deprived Plaintiff of her rights. Plaintiff intended to use documents concerning complaints against prison guards to establish the Defendant, Carver or Defendant, County's policy of or acquiescence in prison guards' behavior leading to deprivation of inmates rights.

Depending upon what it contained, Defendant, Plata's personnel file could show history of violent propensities or sexual attacks. Defendant County's knowledge of acquiescence in some and/or various other incidents or remarks which could aid Plaintiff in her case against all Defendants. Hence, the information sought was relevant and necessary to Plaintiff's case.

By refusing to provide documents to Plaintiff as ordered by the Court, Defendants knowingly, intentionally and in violation of court orders hampered Plaintiff in her access to the proof necessary to ward off summary judgment.

Here, Plaintiff's discovery requests from 1987 were not answered. In March 1988, the District Court ordered Defendants to produce documents within seven (7) days.

Defendants failed to comply. The Defendant, Platt never did comply and Defendants Carver and County only complied after apologizing to the Court for their causing the delay in Plaintiff's ability to respond to their motions, as aforesaid.

Federal Rule of Civil Procedure 56(e) contemplates a reasonable opportunity to respond to the moving party's supporting materials. Macklin v. Butler 553 F.2d 525 (7th Cir, 1977).

Plaintiff is entitled to reasonable opportunity to respond to supporting materials because opposition to a summary judgment motion often is a difficult task usually involving preparation of both legal and factual arguments as well as affidavits because the results of failure are drastic and because the time provided ought to produce a well-prepared and complete pre-

sentation on the motion to facilitate its disposition by the court. Hanson v. Polk County Land, Inc. 608 F.2d 129 (5th Cir, 1979). Here Defendants refused to produce requested documents despite a court order to produce. Defendants finally produced some documents only after apologizing to the court for failing to comply with its June 9, 1988 Order. The documents requested dealt precisely with Plaintiff's burden of proving her case against Defendants, aforesaid. Thus, Defendants' failure to produce impacted upon Plaintiff's ability to respond to Defendants' motions.

Plaintiff finally obtained the documents from Defendants on or about Saturday, July 16, 1988. Plaintiff then promptly responded to the motions within the time Plaintiff believed was prescribed by the June 9, 1988 Order. Plaintiff was entitled

to discover the potentially favorable information, (Shering Corp., supra), and was entitled to a reasonable opportunity to respond (Hanson, supra, and Order of June 9, 1988). Hence, the claims against Defendants should be reinstated and Defendants' motions should be addressed on their merits.

d. Assuming, arguendo, Plaintiff failed to respond in a timely manner, the court order automatically granting summary judgment contravenes the interest of justice. Factors the court should consider in assessing where the interest of justice lie in consideration of a dismissal for lateness in responding to a motion are egregiousness of the lateness, prejudice caused to the moving party by delay, and proferred excuse for the delay. Greene v. Union Mutual Life Insurance Company of America,

764 F.2d 19 (1st Cir, 1985).

Plaintiff here was not late, as aforesaid. Even assuming arguendo that Plaintiff's response was late, it was only a few days late. Finally, even if Plaintiff's response was late, the violation was not egregious, and the short delay occasioned no prejudice to Defendants.

In Greene Plaintiff's counsel could offer no real excuse for delay, citing office procedure failures, misunderstanding between counsel, and his quasi-vacation all of which served to demonstrate rather than excuse neglect. Greene, supra. Nevertheless, based upon the short length of the delay and the absence of prejudice to the moving party, the court reversed the dismissal.

Here, in contrast, Plaintiff offered a reasonable explanation for the so-called

lateness, and any delay was minimal and not prejudicial to Defendants. Thus, in the interest of justice, Plaintiff's claims against Defendants should be reinstated and the motion for summary judgment addressed on their merits.

The Court must balance the need to alleviate court calendar congestion versus Plaintiff's right to due process and fair chance to be heard. See, e.g., Harding v. Federal Reserve Bank of New York, 707 F.2d 46 (1983).

Plaintiff's counsel fully understands the court's power and necessity to insist response to motions be filed in a timely manner. Plaintiff's counsel in no way minimizes that rule and necessity. Rather, Plaintiff's counsel reasonably believed and therefore contends, that he complied with the literal meaning and spirit of the

court's rules and orders. In a case such as this, Plaintiff's constitutional right to due process and a fair chance to be heard should not be outweighed by the automatic granting of summary judgment for "lack of response." Hence, Defendant's motions should be reinstated and addressed on the merits.

CONCLUSION

For the foregoing reasons, this Petition For Writ of Certiorari ought to be granted.

Richard J. Orloski,
Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 88-1759

ISMAEL PIZARRO a/k/a LISA PIZARRO,

Appellant

v.

DAVID JOSEPH PLATA, WILLIAM PLATT, TIMOTHY CARVER and COUNTY OF LEHIGH

(D.C. Civ. No. 87-1243)

SUR PETITION FOR REHEARING

Present: GIBBONS, Chief Judge, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON SCIRICA, COWEN and NYGAARD, Circuit Judges.

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a

majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT:

_____

Dated: February 28, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 88-1759

ISMAEL PIZARRO a/k/a LISA PIZARRO,

Appellant

v.

DAVID JOSEPH PLATA, WILLIAM PLATT, TIMOTHY CARVER and COUNTY OF LEHIGH

Appeal from the United States District Court For the Eastern District of Pennsylvania D.C. Civil Action No. 87-1243
(Hon. Daniel H. Huyett, 3rd)

Before: HUTCHINSON, SCIRICA and NYGAARD, Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment

of the district court be and is hereby AFFIRMED.

Each side to bear its own costs.

BY THE COURT:

_____

Circuit Judge

ATTEST:

Sally Mrvos, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ISMAEL PIZARRO, a/k/a LISA PIZARRO,
vs.
DAVID JOSEPH PLATA,

CIVIL ACTION NO. 87-L243

CIVIL JUDGMENT

Before: HONORABLE DANIEL H. HUYETT, 3rd

AND NOW, this 16th day of September, 1988, in accordance with the Order dated September 16, 1988, IT IS ORDERED that Judgment be and the same is hereby entered in favor of the Plaintiff and against the defendant in the sum of thirty-five thousand ($35,000.00).

BY THE COURT:

_____

Leslie F. Stott,
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ISMAEL PIZARRO, a/k/a LISA PIZARRO,
vs.
DAVID JOSEPH PLATA,

CIVIL ACTION NO. 87-L243

ORDER

HUYETT, J.
AUGUST 31, 1988

Upon consideration of plaintiff's motion for reconsideration, defendants, Timothy Carver, County of Lehigh and William Platt's responses, and because

1. Plaintiff filed this civil rights action on March 5, 1987. By order dated April 1, 1987, the court set a discovery deadline of June 17, 1987 and an arbitration date of July 13, 1987. On that date, the court also vacated the previous discovery deadline and set a new deadline of July 31, 1987.

2. On August 14, 1987, plaintiff

filed a motion for an extension of the discovery deadline. By order dated August 20, 1987, the court vacated the second discovery deadline and set a third deadline for November 30, 1987. This order stated "counsel should take whatever steps are necessary to ensure compliance with this time limitation."

3. On August 14, 1987, defendant Platt filed a motion for summary judgment. By order dated September 9, 1987, the court denied defendant Platt's motion for summary judgment without prejudice to its renewal after the resolution of two outstanding discovery requests. In his response to this motion, plaintiff argued that granting the summary judgment motion would be premature because of the outstanding discovery requests. Plaintiff's response did not address the merits of defendant, Platt's

summary judgment motion.

4. On September 30, 1987, the Court entered a default against Defendant, David Joseph Plata. A hearing on damages is scheduled for September 16, 1988.

5. By order dated January 4, 1988 and at the defendants' request, the court set a fourth discovery deadline of February 15, 1988. This order stated that "no further extensions will be granted" and "counsel will proceed with this action."

6. Defendants Thomas [sic] Carver, the County of Lehigh, and William Platt filed their motions for summary judgment on March 17, 1988. Plaintiff filed an untimely response on April 11, 1988. This response was approximately one week late and did not address the merits of the summary judgment motions. Instead, plaintiff's response stated that the

motions were premature because defendant Carver's deposition had to be completed and plaintiff had not yet received certain documents requested from defendant, Platt in discovery.

7. By order dated June 9, 1988, the court ordered plaintiff to file a letter with the court stating what documents he still sought. The court also ordered the parties to complete the deposition of defendant Carver within thirty (30) days of the date of that order. Finally, the court instructed plaintiff to file a substantive response to the summary judgment motions within "twenty (20) days of the date of the Carver deposition." This order stated that "NO FURTHER EXTENSIONS SHALL BE GRANTED. Plaintiff and his counsel shall comply with the above deadlines or face possible sanctions, including dismissal;"

8. According to the letter of Thomas M. Caffrey, Esquire, dated July 13, 1988, and as agreed by plaintiff, the parties held defendant Carver's deposition on June 29, 1988. At the deposition, defendants Carver and the County of Lehigh agreed to produce to plaintiff certain documents. Pursuant to my June 9, 1988 order, plaintiff's response to the summary judgment motions was due twenty days from the Carver deposition or on July 19, 1988. Because plaintiff had not filed his substantive response as of July 28, 1988, the court granted defendants William Platt, Timothy Carver, and County of Lehigh's motions for summary judgment for lack of a response.

9. On August 3, 1988, plaintiff filed his response to defendants' motions for summary judgment. Plaintiff filed a motion

for reconsideration of my order dated July 28, 1988 on August 5, 1988. In his motion for reconsideration, plaintiff argues that defendant Carver's deposition was not "completed" until July 14, 1988 when the documents promised at defendant Carver's deposition were mailed.

10. Plaintiff has been given ample opportunity to respond to the defendants' motions for summary judgment.

Further, plaintiff, as illustrated by the numerous discovery extensions and the prior summary judgment denial dated September 9, 1987, has been given ample opportunity for discovery.

11. My order dated July 28, 1988 clearly states that plaintiff's substantive response to defendants' summary judgment motions was due within twenty days of the Carver deposition. This order does not

state that plaintiff may file a response after receiving documents requested at the carver deposition. Moreover, at no time did plaintiff's counsel notify the court or opposing counsel that he needed additional time within which to file his response or that he would consider the Carver deposition completed when he received the promised documents.

12. Nor did the receipt by plaintiff's counsel of the promised documents on or about July 14, 1988 prevent plaintiff from filing his substantive response by July 19, 1988. The exhibits attached to plaintiff's response are documents produced by defendant William Platt.

13. Contrary to the assertions of plaintiff, defendant Carver's attorney's letter dated July 13, 1988 was not a apology for failing to comply with my July

9, 1988 order by not completing the Carver deposition in a timely manner. Rather, this letter was an attempt to comply with my order dated July 23, 1988 requiring defendants to respond to plaintiff's letter outlining what discovery was still needed. Finally, the documents produced by defendants County of Leigh and Timothy Carver on July 14, 1988 were not incomplete. Correspondence from plaintiff Pizarro to defendant Carver was not produced because any such correspondence could not be found.

Therefore, Plaintiff's motion for reconsideration is DENIED.

IT IS SO ORDERED.

Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ISMAEL PIZARRO, a/k/a LISA PIZARRO	:	CIVIL ACTION
	:	NO. 87-1243
WILLIAM PLATT, et al.	:	

ORDER

HUYETT, J.
JULY 28, 1988

Upon consideration of the defendants' motions for summary judgment, plaintiff's response seeking additional discovery, and because

1. Plaintiff filed this civil rights action on March 5, 1987. By order dated April 1, 1987, the court set a discovery deadline of June 17, 1987 and an arbitration date of July 13, 1987. By order dated June 9, 1987, the court vacated the previous discovery deadline and set a new deadline of July 31, 1987.

2. On August 14, 1987, defendant

Platt filed a motion for summary judgment. By order dated August 20, 1987, the court vacated the second discovery deadline and set a third deadline for November 30, 1987. By order dated September 9, 1987, the court denied defendant Platt's motion for summary judgment without prejudice to its renewal after the resolution of two outstanding discovery requests. In his response to this motion, plaintiff argued that the granting of the summary judgment motion would be premature because of the outstanding discovery requests.

3. By order dated January 4, 1988, the Court set a fourth discovery deadline of February 15, 1988. This order stated that "no further extensions will be granted" and "counsel will proceed with this action."

4. Defendants Thomas [sic] Carver,

the County of Lehigh, and William Platt filed their motions for summary judgment on March 17, 1988.

5. Defendant filed an untimely response on April 11, 1988. This response was approximately one week late and did not address the merits of the summary judgment motions. Instead, plaintiff's response stated that the motions were premature because defendant Carver's deposition had to be completed and plaintiff had not yet received documents requested from defendant Platt in discovery.

6. by order dated June 9, 1988, the court ordered plaintiff to file a letter with the court stating what documents he still sought. The court also ordered the parties to complete the deposition of defendant Carver within thirty (30) days of the dated of the order. Finally, the court

instructed plaintiff to file a substantive response to the summary judgment motions within twenty (20) days of the Carver deposition. This order stated that "NO FURTHER EXTENSIONS SHALL BE GRANTED. Plaintiff and his counsel shall comply with the above deadlines or face possible sanctions, including dismissal."

7. According to the letter of Thomas Caffrey, Esquire, dated July 13, 1988, the parties completed defendant Carver's deposition on June 29, 1988. Therefore, Plaintiff's response to the summary judgment motions was due on July 19, 1988. As of the date of this order, plaintiff has not filed a substantive response to the defendants' motions for summary judgment.

Therefore, the defendants' motions for summary judgment are granted for lack of a

response.

IT IS SO ORDERED.

Daniel H. Huyett, 3d Judge